Petition

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IN THE

Supreme Court of the United States

OCTOBER TERM 1981

No. .....

COX ENTERPRISES, INC., d/b/a
THE LUFKIN NEWS and JOE MURRAY,
Petitioners,

v.

MARCUS F. VASCOCU, Judge Presiding in the District Court of Angelina County, Texas, 217th Judicial District; B. H. MCVICKER; LARRY RISINGER; R. M. SHUMAKER; ROBERT DOLLAK; JUANITA SPENCER and TEXAS NATIONAL BANK OF LUFKIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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December 22, 1981

QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the Constitution of the United States prohibit a state court from barring the public and the press from pretrial proceedings in a civil suit without a showing that a public proceeding would jeopardize some fundamental rights of the parties to the case.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

The petitioners, Cox Enterprises, Inc.,[1] d/b/a The Lufkin News, and Joe Murray respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered in this proceeding on September 24, 1981.

[1] The following companies are subsidiaries of Cox Enterprises, Inc.: Cox Arizona Publications, Inc.; Dayton Newspapers, Inc.; Golden Triangle Publications, Inc.; Grand Junction Newspapers, Inc.; Guide Newspaper Corporation; Longview Newspapers, Inc.; Miami Daily News, Inc.; Palm Beach Newspapers, Inc.; Springfield Newspapers, Inc.; Clarendon Farms, Inc.; Hualalai Land Corporation; Nine Bar Ranch – New Mexico; CEI Newsprint, Inc.; Hampton Roads Energy Company; and Security Marine Terminal Company.

OPINION BELOW

The Supreme Court of Texas did not deliver an opinion. The order of that Court appears in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Texas was entered on September 24, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

Whether the First and Fourteenth Amendments to the Constitution of the United States prohibit a state court from barring the public and the press from pretrial proceedings in a civil suit without a showing that a public proceeding would jeopardize some fundamental rights of the parties to the case.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . . .

Fourteenth Amendment:

> No State shall make or enforce any law which abridges the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This case arises from a stockholders derivative action brought in the district court of Angelina County, Texas by shareholders of Texas National Bank of Lufkin, Texas on behalf of the bank against the bank's directors seeking damages for mismanagement and other relief. On August 3, 1981, the judge, Marcus F. Vascocu, a respondent in this case, convened a pretrial hearing to consider, among other matters, a special appearance by a party, motions relating to the sufficiency of the pleadings, a plea to the court's jurisdiction, and a motion to disqualify the shareholders' lawyer and the lawyer of a third-party defendant. At the beginning of the pretrial hearing, the attorney for the defendant bank directors filed a motion asking the court to close the courtroom to everyone except the parties, the witnesses at the time they were to testify, and the lawyers.

The only grounds for the motion were that the "cause at hand involves sensitive and confidential matters impinging upon the operation and reputation of a National Bank Association" and "the potential for damage to a National Bank arising from the mere airing of such charges . . . ." (App. 2.) No evidence was presented on the motion. Judge Vascocu granted the motion and ordered a reporter from the Lufkin News to leave the courtroom. The reporter called his editor, Joe Murray, who immediately went to the courthouse and objected to the order. Within a few minutes, counsel for newspaper[2] objected formally to the order. After a brief discussion, during which no evidence was offered, Judge Vascocu refused to alter his ruling, saying "This is a highly sensitive matter and [there] will be some

[2] The Lufkin News is the only daily newspaper in Angelina County, Texas.

decisions made here the public wouldn't particularly understand." (App. 3.)

Following their exclusion from the hearing on August 3, Petitioners filed a petition in intervention for the limited purpose of objecting to the order closing the proceedings, asked the court to make a copy of the transcript of the August 3 hearing available, and to open future pretrial hearings to the public. In the alternative, Petitioners requested Judge Vascocu to review the evidence taken at the August 3 hearing and determine whether the disclosure of the evidence would seriously jeopardize some fundamental right and to release those portions that would not create such a risk. Finally, Petitioners asked Judge Vascocu to close only those portions of the subsequent pretrial hearings which he found must be closed to protect some party's fundamental right. A hearing on these motions was held on September 3. No evidence was presented to show why a secret proceeding was necessary. Judge Vascocu, however, denied Petitioners all of the relief they prayed for.[3] (App. 2-6-10.)

Petitioners filed a motion for leave to file a petition for a writ of mandamus in the Supreme Court of Texas. The motion for leave to file was denied. (App. 5.)

Petitioners raised the federal question asserted in this petition in paragraph III of their motion in Judge Vascocu's court (App. 4), and on pages 12 through 16 of the petition for writ of mandamus it sought to file in the Texas Supreme Court. (App. 6.) The order of the Texas Supreme Court does not disclose the basis of that court's

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[3] On September 28, 1981, a pretrial was held in secret and at that hearing a motion filed by a party to have the pretrial proceedings open to the public was heard in secret and apparently denied. Another pretrial hearing is scheduled for December 28, 1981.

decision. (App. 7.) There is no other procedure in Texas to review Judge Vascocu's action until a final judgment is entered in the underlying case at which time the present controversy may be moot. There is no basis for concluding the decision was based on independent, adequate state law grounds.[4] Under Rule 474, Texas Rules of Civil Procedure, a denial of a motion for leave to file a petition for a writ of mandamus reflects a decision that the underlying writ should not be granted.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW IS IN CONFLICT WITH THIS COURT'S DECISIONS IN *GANNETT CO.* v. *DEPASQUALE*, 443 U.S. 368 (1979) AND *RICHMOND NEWSPAPERS, INC.* v. *VIRGINIA*, 448 U.S. 555 (1980) AND THE DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS IN *UNITED STATES* v. *EDWARDS*, 430 A.2d 1321 (D.C. APP. 1981) AND THE SUPREME COURT OF VIRGINIA IN *RICHMOND NEWSPAPERS, INC.* v. *VIRGINIA*, 281 S.E.2d 915 (VA. 1981).

Gannett Co. v. *DePasquale*, 443 U.S. 368 (1979) arose from a murder case in upstate New York that had generated

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[4] Petitioners have also filed a complaint pursuant to 42 U.S.C. § 1983 in the United States District Court for the Eastern District of Texas against Judge Vascocu and the state officials charged with responsibility of enforcing his order. In that complaint, Petitioners allege that they have been denied rights guaranteed by the First and Fourteenth Amendments to the Constitution of the United States because the State fails to provide a procedural device whereby orders closing courtrooms can be entered only after notice to interested persons, including the news media, and after an evidentiary hearing at which the party seeking to close a courtroom has to show that failure to close the courtroom would seriously jeopardize some of his fundamental rights. The District Court entered an order on December 11, 1981 dismissing that claim on the grounds it lacked jurisdiction. It concluded that the review of the action of the Supreme Court of Texas was subject to this Court's exclusive jurisdiction under 28 U.S.C. § 1257(3). C. A. No. L-81-14-CA, Joe Murray, et al v. Sammy Leach, Jr., et al, in the United States District Court for the Eastern District of Texas, Lufkin Division.

a great deal of publicity. During the pretrial stage of the case, the defendants asked Judge DePasquale to suppress statements that they had made to the police. They also asked the court to exclude the press and public from the suppression hearing. The prosecutor agreed and the hearing was held in private. The next day the press objected and sought a copy of the transcript. Judge DePasquale held a hearing on the newspaper's request and, on the basis of the record at that hearing, found that an open suppression hearing and the release of the transcript prior to trial "would pose a 'reasonable probability of prejudice to these defendants.' Thus the trial court found that the . . . press did have a right of access of constitutional dimension, but held, under the circumstances . . . that this right was outweighed by the defendants' right to a fair trial." 443 U.S. at 393.

This Court concluded that Judge DePasquale had struck the right balance. The Court, however, was badly divided. The basis of the holding can be determined only from a review of several opinions.

Justice Stewart, who delivered the opinion for the Court, was joined by the Chief Justice, Justice Powell, Justice Rehnquist, and Justice Stevens. The Chief Justice, Justices Powell and Rehnquist wrote separate opinions. The bulk of Justice Stewart's opinion deals with whether the Sixth Amendment gives the public and press any right to attend all or parts of a criminal trial and concludes that it does not. As an alternative basis for his decision, however, Justice Stewart wrote that *if* the First and Fourteenth Amendments granted a right of public access to pretrial proceedings, then Judge DePasquale's ruling met any standard for closing those proceedings because it was based on sufficient evidence that an open suppression hearing, under the circumstances of that

case, would jeopardize the defendants' constitutional right to a fair trial. 443 U.S. 391-92.

The Chief Justice wrote separately, dealing only with the Sixth Amendment and suggesting that he would find a Sixth Amendment public right to attend trials on the merits. Justice Rehnquist wrote saying that he would find no constitutional right of access to any judicial proceedings. Justice Powell, on the other hand, explicitly found a First and Fourteenth Amendment right for the public and press to attend pretrial proceedings. He concurred with Justice Stewart, however, because he believed that the right could be overcome when the party seeking closure made "some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings." 443 U.S. at 401.

Justices Blackman, Brennan, White, and Marshall dissented, concluding that the public had a Sixth Amendment right to attend the suppression hearing, suggesting they found such a right under the First Amendment, and finding that the record before Judge DePasquale did not, as a matter of law, support his findings of prejudice to the defendants. 443 U.S. at 406.

Gannett makes it clear that at least the four dissenters and Justice Powell would find that the public, including the press, had a right to attend pretrial proceedings and that in order for that right to be overcome, the moving party had to make a factual showing that failure to close the pretrial proceeding would present some probable risk to the movant's constitutional rights. Justice Stewart hinted that he would reach the same result. Only the Chief Justice found that the distinction between pretrial proceedings and trials on the merits was important.

Exactly one year later this Court decided *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 584 (1980). *Richmond Newspapers* reversed the order of a Virginia trial court that had excluded the press and the public from a murder trial. At the beginning of the defendant's fourth trial (one earlier conviction having been reversed and two subsequent retrials having resulted in mistrials), the trial judge granted the defendant's unopposed motion to close the trial, apparently to avoid the possibility of yet another mistrial. The local newspaper almost immediately objected, but the Virginia court refused to require the defendant to make any showing that an open trial would jeopardize any constitutional rights.

The Chief Justice delivered the judgment of the Court in an opinion joined by Justices White and Stevens. The Chief Justice attempted to distinguish *Gannett* on the grounds that the hearing in *Gannett* was a pretrial hearing. Justice White wrote separately saying that *Gannett* had been wrongly decided. Justice Stevens also wrote that the First Amendment protects the public and the press from abridgement of their right of access to information about the operation of the judicial branch of government. 448 U.S. at 584. Justices Brennan and Marshall concurred separately restating their views that the Sixth Amendment grants a right of access, but explicitly agreeing that the First Amendment also secures to the public a right of access to judicial proceedings. Justice Blackman wrote separately, maintaining the views he stated in *Gannett*, 448 U.S. at 601.

Although the decision in *Richmond Newspapers* explicitly reached only the question of whether the First and Fourteenth Amendments guarantee access to trials on the merits, it is clear from the several opinions in that case and in *Gannett* that this Court has announced a rule that

the press and public have a qualified right to attend all judicial proceedings, including pretrial proceedings. This qualified right may be overcome only upon a showing that public proceedings will pose a serious threat to fundamental, probably constitutionally protected, rights of a participant in a judicial proceeding. The Supreme Court of Virginia in *Richmond Newspapers, Inc.* v. *Virginia,* 281 S.E.2d 915 (Va. 1981) and the District of Columbia Court of Appeals in *United States* v. *Edwards,* 430 A.2d 1321, 1344 (1981 en banc) have concluded that this Court has announced such a rule.

While this is a civil case and both *Gannett* and *Richmond Newspapers* are criminal cases, the Chief Justice and Justice Stewart made clear in *Richmond Newspapers* that they believed that the rule announced in that case was equally applicable to civil cases. The Chief Justice said that while the issue of civil trials was not before the Court, "we note that historically both civil and criminal trials have been presumptively open." 448 U.S. at 580 n. 17. And Justice Stewart said that the "First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal." 448 U.S. at 599. Indeed, the civil justice system is of at least as much importance to society as the criminal justice system. Here a case involving the integrity of a bank in which many citizens have their savings is plainly more important to the people of Lufkin, Texas[5] than all but the most important criminal cases.

The judgment of the Supreme Court of Texas is in direct and irreconcilable conflict with this Court's decisions in

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[5] Mr. Murray testified at the September 3, 1981 hearing on Petitioners' motion to intervene that there was great public interest in the story. (Tr. 14.) The Lufkin News has a circulation of 16,000 on Sunday and about 15,000 on weekdays.

Richmond Newspapers and *Gannett* and the Supreme Court of Virginia's and District of Columbia Court of Appeals' interpretations of those cases. Judge Vascocu has closed important judicial proceedings without an evidentiary or other showing that a public proceeding could jeopardize any party's right to a fair trial or any other right of any other person. The sole basis found by the court is that the case involves delicate matters and the people may not particularly understand the court's decisions. Moreover, the closure order apparently applies to all future pretrial proceedings of every nature without regard to the issues to be dealt with, the circumstances of a particular hearing, or any other consideration.

These conflicts justify the grant of certiorari to review the judgment below.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Texas.

Respectfully submitted,

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APPENDIX

APPENDIX 1

No. 18,558-81-5

W. B. SHELTON, *et al*	IN THE DISTRICT COURT OF
vs.	ANGELINA COUNTY, TEXAS
B. H. MCVICKER, *et al*	217th JUDICIAL DISTRICT

MOTION FOR HEARING IN CAMERA

Come now Defendants in the above numbered and captioned cause, and move the Court to hold its pretrial hearing on 3 August, 1981, *in camera*, permitting in the hearing room only the respective counsel for parties and witnesses at their time of testimony only, and would show the Court as grounds therefor:

I.

The cause at hand involves sensitive and confidential matters impinging upon the operation and reputation of a National Banking Association. Said Bank is therefore integrally a part of the National Banking System of the United States. Where Federal Courts have heard like cases, they have sealed the records of such cases (See Exhibit 9 to CHALLENGE TO JURISDICTION OF STATE COURT: MEMORANDUM OF POINTS AND AUTHORITIES, previously filed with the Court), because of the potential for damage to a National Bank arising from the mere airing of such charges, whether ultimately found to be valid or invalid.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this day handed a true and correct copy of the above and foregoing MOTION FOR HEARING IN CAMERA to opposing counsel in the hearing room of the Angelina County Courthouse, Lufkin, Texas.

.....

JIM MCBRIDE
Attorney for Defendants

APPENDIX 2

CAUSE No. 18,558

W. B. SHELTON, JR., *et al* vs. B. H. McVICKER, *et al* } IN THE DISTRICT COURT OF ANGELINA COUNTY, TEXAS

(ORIGINAL)

HEARING ON MOTION FOR INTERVENTION SEPTEMBER 3, 1981

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THE COURT: Good morning, gentlemen.

ATTORNEYS: GOOD MORNING, YOUR HONOR.

THE COURT: We are here on the matter of the petition for intervention. The only thing I find in the file is the petition for intervention.

MR. JOHN ANDERSON: Your honor, my name is John Anderson.

THE COURT: How are you, Mr. Anderson.

MR. JOHN ANDERSON: Pleased to meet you sir. I represent the paper. I have filed a brief. It may not have reached the District Clerk's office yet. I also sent a copy to you in Longview. I don't know whether you received it or not.

THE COURT: I didn't receive it.

MR. JOHN ANDERSON: All right sir. Well, I have an additional copy I would be happy to give to you right now.

THE COURT: All right.

MR. JOHN ANDERSON: If you would like. And I have given copies of it to other counsel.

MR. MIKE PATTERSON: Judge, I have a motion here in opposition to the motion for intervention I did not file. I thought I would just hand it to you.

MR. JIM McBRIDE: Your honor, may I make a preliminary motion before filing my answer?

THE COURT: Yes sir.

MR. JIM McBRIDE: On behalf of the five individual defendants I renew our motion challenging the jurisdiction of the court to hear any matter in the case in chief.

THE COURT: You know, I don't know if it's a matter of communication. I had a voluminous number of cases that I find here in the file that I find to be interesting. Have you furnished these gentlemen copies, did you file these?

MR. JIM McBRIDE: I filed some cases with the court, your honor and I filed a memorandum to which they were appended onto the court's copy and of course they are cited in the memorandum. I have not xeroxed —

THE COURT: I didn't see the memorandum. You mean these cases here?

MR. JIM McBRIDE: May I approach the bench, your honor?

THE COURT: Yes sir. Is that yours?

MR. JIM McBRIDE: That's one I filed, yes sir. I believe these cases were filed by me. They were appended to the memorandum, point some authorities challenging the authority of the court which your honor read at the third of August —

THE COURT: Yes sir.

MR. JIM McBRIDE: Hearing.

THE COURT: Well, I didn't have these cases, nor have I had opportunity to digest them. You may be absolutely right. But do you have some —

MR. JOHN ANDERSON: Your honor, I have a brief in support of our petition.

THE COURT: Is that the same as this that is in the Court's file?

MR. JOHN ANDERSON: Well, your honor, I would hope so but I don't know.

THE COURT: Well, look and see.

MR. JOHN ANDERSON: Yes, your honor, this is the brief that intervenors have filed.

THE COURT: Have you given them a copy?

MR. JOHN ANSWERSON (sic): Yes sir, I have sent it to the other attorneys by special delivery.

MR. JIM McBRIDE: Could I ask your honor for a ruling on my motion as to jurisdiction.

THE COURT: I am going to carry it along because I want to look at these cases.

MR. JIM McBRIDE: All right. Then could I have a continuing objection to all of these proceedings while it is pending?

THE COURT: Yes sir, you sure may.

MR. JIM McBRIDE: Thank you. Your honor, I am going to file an answer and memorandum to this intervenor's petition in intervention and move to strike the Cox Enterprises on grounds of standing. My reasons are covered in the first paragraph of the memorandum.

THE COURT: Did you give them a copy?

MR. JIM McBRIDE: Yes sir.

THE COURT: Let me read these answers. I have read your application.

MR. MIKE PATTERSON: Excuse me, your honor. Before we go any further the bank would like to make a motion that this hearing be held in private, for the reasons that were advanced for the initial in camera hearing. In support of this we argue one, this is a continuation of the hearing that we held a month ago. Secondly, we may be getting into some matters that we didn't want publicized in the first place.

THE COURT: I am going to admonish the counsel in this case to stick within the realm of the pleadings on this intervention and nothing else.

MR. JOHN ANDERSON: I have no intentions of going into anything in regards to the merit of this lawsuit at all your honor.

THE COURT: Over rule that motion.

MR. JOHN ANDERSON: Thank you, your honor. Your honor, my name is John Anderson. I represent the Cox Enterprises and Lufkin News in this matter. The intervenors have no intention of interferring or

THE COURT: Is that a criminal case in which the court held that there could be pretrial matters outside?

MR. JOHN ANDERSON: Your honor, Gennett vs DePasqualie is a criminal case.

MR. MIKE PATTERSON: Yes it was, your honor.

THE COURT: It was a criminal case.

MR. JOHN ANDERSON: In which the Supreme Court held that the defendants sixth amendment rights to a public trial, that sixth amendment right did not entitle the public to attend. The court also recognized the first amendment right that the requirement of the first amendment had been met in DePasqualie.

THE COURT: All right.

MR. JOHN ANDERSON: Speaking of —

THE COURT: I am familiar with that case. Gentlemen, let me make some observations. First of all, I want you to know that the court has nothing against the news media, Mr. Murray. As a matter of fact I cooperate with the news media as best I can in trials in my own county. The Texas Rules of Procedure allows for intervention in civil matters subject to be stricken by the court. Now I have — I have on my own, looked at a lot of cases with regard to interventions. I do not find one that says that the party intervening must have a justifiable interest. And that's the reason I asked Mr. Murray if he owned a share of stock. I think that he even, now, in connection with this intervention he realized that that might be import to own a share of stock or something from which he could recover damages one way or the other. Now, there may be some sensitive documents which would be damaging to a national bank, I can think of those, in a pretrial hearing. I think counsel representing the newspaper realizes that in pretrial hearings one you have got here, you have already outlined what we are talking about. You know, and every other lawyer knows and the end result of or findings of the court although they may have some outcome, some influence on the outcome of the case, making a party amend its pleadings I don't know what a newspaper would want to report that to the public for. Whether or not one lawyer is disqualified, if he is disqualified another one would come in to represent the party. I don't know how important that is to the public. I — actually the main trial of this case, since the news media has already publicized it rather extensively, the main trial of this case and the outcome of what that jury is going to think and what they do would seem to be more

important, I don't know, than pretrial. Where a lawyers exchange jargon and the public wouldn't even understand. I don't know. First off, Mr. Armstrong, I do not think, although I am sympathetic with the media and I want them to publish anything that they feel they ought to publish. I do not think that the news media has any standing in this case, so far as being a party to the lawsuit. Now, what you have done, you have run up some court costs here that these people over here are going to have to pay, somebody is going to have to pay them. And I know of no law, unless the first amendment does say so and I don't believe that it does, on pretrial matters. I think that this hearing could have been held in chambers if the court had wanted to and that the first amendment wouldn't apply. Now I realize the importance of the first amendment, Mr. Murray. Now, my ruling in this case is going to be like it really was and you can appeal the matter if you so desire. And you will probably have plenty of time to do it, to appeal it if you desire. I don't know whether you can appeal from this matter or not, that's another thing. May appeal from it after the case is over but I don't know that you can at this point. The ruling of the Court is, I am going to strike the intervention. And I am going to continue the hearing on the in camera basis. Now I made a statement to the reporter that anything that occurred in this courtroom that I thought that I could release to the media, that I would do so. That would be the ruling in regard to this intervention. Anything further?

MR. JIM McBRIDE: No your honor.

MR. JOHN ANDERSON: Yes, your honor. May I ask that the court reporter in addition to preparing a statement of facts from this hearing today also be allowed to

prepare a statement of facts from the portion of the hearing that was closed back on August the third and that, at the newspaper's expense, and that that hearing, that that be sealed, your honor.

THE COURT: That would be controvening my ruling in the first instance if I allowed that.

MR. JOHN ANDERSON: No, your honor, that that be sealed and forwarded to the Supreme Court along with our petition for Writ of Mandamus so that the Supreme Court would have an opportunity to view that evidence to determine whether or not in fact anything occurred at that hearing that required the public be excluded because one of the things we have asked in our plea of introvention is that a transcript be made available to us or that such portions of it as do not contain confidential information be made available to us. So I would simply ask that that be made available to the Supreme Court.

THE COURT: I will make whatever the Supreme Court wants from me, I will make available to them if you need that transcript I will seal it and send it to them. Anything further?

MR. MIKE PATTERSON: Judge I don't have anything further on this hearing but because of this hearing has taken some time and you said last time that you wanted everything regarding the different matters we were hearing within a week before that hearing, could we have a couple of days extension on that?

THE COURT: Yes sir.

MR. MIKE PATTERSON: Thank you.

MR. JIM McBRIDE: Does that constitute resetting the hearing from the 9th to another date, your honor?

THE COURT: Yes sir.

MR. KENZY HALLMARK: Beg your pardon, I didn't understand the court's ruling?

THE COURT: I am going to reset that September the 9th and I will just have to check the calendar.

MR. JIM McBRIDE: Could I ask your honor to try to avoid Wednesday. I am a Colonel in the Army Reserve and I have got a string of Wednesdays that I am in a real bind on.

THE COURT: I will try to do that.

MR. JIM McBRIDE: Thank you

MR. KENZY HALLMARK: Do I understand then that the September 9th hearing is presently canceled subject to resetting?

THE COURT: It is presently canceled subject to reset at an early date.

MR. JOHN ANDERSON: May we be excused, your honor?

THE COURT: You may be excused.

MR. JIM McBRIDE: Thank you, your honor.

HEARING IS CLOSED

Certified true and correct.
September 4, 1981.

.....

THOMAS SNEAD, JR.
Official Court Reporter
734 Southwood
Lufkin, Texas 75901

NOTARY PUBLIC SEAL

CERTIFIED SHORTHAND REPORTER SEAL

APPENDIX 3

CAUSE No. 18,558

W. B. SHELTON VS. B. H. McVICKER	}	IN THE DISTRICT COURT OF ANGELINA COUNTY, TEXAS

EXCERPTS FROM PRETRIAL MOTIONS AS REQUESTED

COURT REPORTER'S NOTE: In Camera Motion is presented in written form to the Court by Mr. Jim McBride.

THE COURT: I will grant that In Camera Motion. Anyone other than parties here?

MR. BILL PERKINS: The press is here, your honor. This is Mr. Phil Latham from the Lufkin News.

THE COURT: Sir, there has been an In Camera Motion filed by the parties and I will have to excuse you from the press. Thank you.

MR. JIM McBRIDE: Thank you, your honor.

MR. WALTER BORGFELD: No your honor. I would have some comment to make with respect to the other motion that was filed by Mr. McBride.

• • • •

MR. JOE MURRAY: My name is Joe Murray, I am Editor of the Lufkin News. My reporter just returned and told me something I thought I had better come over here and ask myself. I couldn't believe it, but I understand the press is not going to be allowed in this hearing.

THE COURT: There has been a motion filed that this be an In Camera Hearing and I have granted the motion.

MR. JOE MURRAY: I would ask, since this is new ground for us, we have never been excluded from a hearing in my 12 years here.

MR. JIM McBRIDE: Your honor, I object to this conversation this is not a party to the case.

MR. JOE MURRAY: I would ask for a recess until our lawyer can get here. I have had him on the phone. We are in a little bit of a problem because the same law firm that represents us is also involved in this case and our regular lawyer can't get over here. But Roger Moss is another lawyer here and he has said he will come over here immediately and we would, if you would, not do any more business until we can —

THE COURT: Well, I have made my ruling with regard to the In Camera Hearing and — at this time, by agreement of the parties.

MR. BILL PERKINS: Your honor, I didn't agree. I don't want you to be misled but I can't —

MR. WALTER BORGFELD: Well, I registered no objection, your honor.

THE COURT: Well, you registered no objection.

MR. JOE MURRAY: All I am asking is —

THE COURT: The defense counsel ask for the in camera hearing and I granted it.

MR. JOE MURRAY: Yes sir. What was the purpose of that?

THE COURT: I don't know what their purpose is but I granted the motion.

MR. BILL PERKINS: Your honor, could I show him the motion?

THE COURT: Yeah, let him see the motion if he wants to.

MR. JOE MURRAY: Really, all I am asking is if I could have opportunity to get a lawyer over here to try to

open up this hearing for the press and public because this is as I say something that never happened here before and we are very concerned about it and I'm sure he will be here in a very short time.

THE COURT: All right.

MR. JOE MURRAY: Can I do that, could I have some time?

THE COURT: I will give you five minutes.

MR. JOE MURRAY: Well, I don't know if I can get him here in five minutes but I will — it's just across town.

THE COURT: All right.

COURT REPORTER'S NOTE: Recess is taken.

MR. ROGER MOSS: May I address the bench on behalf of my client, your honor?

THE COURT: Yes sir.

MR. ROGER MOSS: Your honor, the Lufkin News, part of the Cox Newspaper Business objects to the Court's holding in the — for the Motion In Camera in the styled case: W. B. Shelton vs B. H. McVicker et al, number 18,558-81-5. The paper, Lufkin News, has been covering this case since its inception and they have in the past never been excluded from a courtroom hearing before. They feel like that —

THE COURT: Have there been any hearings on this case?

MR. JIM McBRIDE: No, your honor.

MR. ROGER MOSS: Not in this particular case but never before in a case have they been excluded from a hearing. They — both parties to the case knew or should have known the newspaper would be covering this. The news-

paper was surprised and asked the court to reset this hearing until such time as the newspaper can contact their regular attorneys in Austin, Texas concerning this matter. We have no objection to it being —

THE COURT: Well, I can have this hearing in chambers, you know, counsel.

MR. ROGER MOSS: Yes sir.

THE COURT: And because of the topography of things here and the only place I can have it is in this courtroom. This very hearing could have been heard in chambers, exclude everybody except the lawyers and parties involved. I think there is ample authority to allow the court to have an in-chambers hearing in the courtroom.

MR. ROGER MOSS: I understand this is a pretrial hearing.

THE COURT: This is pretrial. I am not excluding the media from the trial of this case on its merits at the proper time. What will come of this case at this time, of course, I'm not in a position to say but these are pretrial matters as between these parties, getting the case ready for trial, for the media to have their day in court too.

MR. ROGER MOSS: I understand that.

THE COURT: This is a highly sensitive matter and will be some decisions made here that the public wouldn't particularly understand. So, based upon the authority that the court has, I am going to have an in camera hearing if I have to retire somewhere else.

MR. ROGER MOSS: Well, it's the paper's position, your honor, that whether or not the public understands what the decisions are or what rulings are made, they should

have opportunity to decide for themselves and I understand there is authority for excluding the press and public from pretrial hearings if the — depending on the interest of the public and the press has in the case. The paper feels like that this being a banking institution that is doing business in this community affects the financial positions of people who live in this community that the people who subscribe and read this paper have a right to know the decisions of the court and the actions of the parties in a case involving a bank in this area. And what they are just asking for is a delay in this matter until such time that their position can be researched and presented unto the court.

THE COURT: Well, counsel, I have traveled some 100 miles to come down here and have this pretrial hearing. And to further delay it, it apparently is going to take all afternoon or all day based upon what has preceeded up to now and it would mean that the Court would have to come back at a later time to have the pretrial hearing to give your counsel a chance to brief it. I think there is ample authority for me to have the in camera hearing, counsel. I think you will agree with that. So, my original ruling will just have to stand.

MR. ROGER MOSS: May I say one more thing if the court please.

THE COURT: Yes sir.

MR. ROGER MOSS: Had the newspaper known, your honor, that this Motion for In Camera Hearing was going to be filed, had it been filed prior to today they would have been prepared for this eventuality. My understand is that the motion was filed just prior to hearing after the press was already in the courtroom.

THE COURT: The court came up here this morning and obtained the court's file and it was there, yes sir. First thing presented to me this morning. I had no objection from part of the parties and the moveant's motion presented and there being no objection to it, the court granted it.

MR. ROGER MOSS: Is there a possibility that the press could be admitted for some of the hearings that is going to be held at this time and be excluded according to the court's ruling from the other part of it?

THE COURT: I haven't — I'm doing this as the matter appears in the record for consideration. Whether or not the press would be, could be admitted to part of it and part not, I don't know at this time. If it's determined that during the hearings of these things that the press was supposed to remain outside and a matter come up that they could receive, why I would be glad to invite them in. I will do it that way but at the present time there is a matter I am taking up, I'm going to take up that the press, I would exclude the press from. After that there may be some that I will invite the press in. I have no objection to that.

MR. ROGER MOSS: The ruling of the court is still the same?

THE COURT: Yes sir.

MR. ROGER MOSS: You are going to exclude it at this time?

THE COURT: I have got to proceed with this matter counsel. I am going to exclude them presently, yes.

MR. ROGER MOSS: Well, we fell like, of course, that it is important for the court to get on with its business and both parties are here for the hearing.

THE COURT: I think I need to and this matter was raised this morning and I take the matters as they come to me as, you know, I should do and that was the first thing raised, wasn't anybody in here from the press at that time that I know of whenever I started the hearing.

MR. ROGER MOSS: I think there was a reporter here at that time, your honor. If we could have —

THE COURT: He may have been. I am not saying there was or wasn't. I am not refuting that.

MR. ROGER MOSS: If we could have until just after lunch, your honor, if you will recess until that time it would give us a moment to look into this and we may can present some authorities to the court too that would satisfy the court to allow us in the court room during the hearing. That would be only two hours or two hours and a half.

MR. JIM MC BRIDE: Your honor, may I address the court?

THE COURT: Yes.

MR. JIM MC BRIDE: Clearly your honor has the authority to grant an in camera hearing as you have already said you could be holding it in chambers. It simply is more comfortable to be having it in this room. You came 100 miles, I came 130 miles. We have got a day at least and maybe a part of tomorrow on these hearing matters. The paper is not properly a party to this case in any respect whatsoever and I would move the court that we go ahead and get on with the hearing.

THE COURT: All right. My ruling is the same.

MR. ROGER MOSS: Thank you, your honor.

• • • •

Certified true and correct as to portion typed.

THOMAS SNEAD, JR.
Official Court Reporter
734 Southwood
Lufkin, Texas 75901

NOTARY PUBLIC SEAL

CERTIFIED SHORTHAND
REPORTER SEAL

APPENDIX 4

No. 18,558-81-5

W. B. SHELTON, et al vs. D. H. MCVICKER, *et al*	IN THE DISTRICT COURT OF ANGELINA COUNTY, TEXAS 217TH JUDICIAL DISTRICT

PETITION IN INTERVENTION, MOTION TO REQUIRE OPEN HEARINGS AND MOTION TO OPEN TRANSCRIPT

TO THE HONORABLE MARCUS F. VASCOCU, JUDGE OF THE COURT:

Cox Enterprises, Inc., d/b/a The Lufkin News, and Joe Murray, its Editor and Publisher, as Intervenors, file this plea in intervention for the limited purposes of respectfully objecting to this Court's previous orders closing certain hearings in this cause, requesting that all future hearings in this cause be open to the public and the press, and requesting that the statement of facts, transcript, and all other evidence be adduced at previously conducted closed hearings in this cause be ordered open to the public and the press.

I.

Cox Enterprises, Inc., d/b/a The Lufkin News (hereinafter referred to as "The Lufkin News") is a Delaware corporation, duly authorized to conduct business in Texas, that owns and operates a daily newspaper in Lufkin, Angelina County, Texas. Joe Murray, the editor and publisher of the Lufkin News is a resident and citizen of Lufkin, Angelina County, Texas.

II.

On or about August 3, 1981, this Court ordered that certain pre-trial proceedings in this cause be closed to the public and the press. Pursuant to that order reporters employed by The Lufkin News were excluded from the courtroom during the conduct of pre-trial hearings, and those hearings were conducted and concluded as closed hearings.

III.

The Court's action in conducting closed hearings in this cause is in violation of Article I, Section 13 of the Constitution of the State of Texas 1876, which reads, in relevant part, "All courts shall be open . . . ." This Court's action in excluding The Lufkin News and its reporters from the hearing is also in violation of Article I, Section 8 of the Constitution of the State of Texas and of the First and Fourteenth Amendments to the Constitution of the United States.

IV.

As members of the free press, Intervenors have standing to assert both their's and the public's rights to require that all judicial proceedings be conducted openly, subject to public scrutiny and view.

V.

In view of the foregoing, Intervenors respectfully request

(1) That they and their reporters be permitted to intervene in this cause for the limited purposes described above.

(2) That this Court allow The Lufkin News and its reporters to receive and make copies of the transcript, statement of facts, and all evidence received at the closed hearing conducted on August 3, 1981 in this cause.

(3) In the alternative, that this Court determine specifically what evidence and other documents should be withheld from The Lufkin News and the public, make specific findings as to the reasons why such evidence and documents should be withheld, and allow The Lufkin News to receive and copy all other evidence and documents as to which no good cause exists for withholding in secret.

(4) That all other and further hearings and trials that may be held in the above cause be open to the public and the press.

(5) In the alternative, that in the event any party or the Court desires to close any subsequent hearing or trial in this cause, The Lufkin News be given notice and an opportunity to be heard prior to the issuance of any orders closing such hearing and that this Court consider alternatives less drastic than secret hearings to protect those interests, if any, that may legitimately be served by secret hearings.

WHEREFORE, PREMISES CONSIDERED, Intervenors pray for the relief requested above and for all such other relief as to which it may show itself justly entitled.

Respectfully submitted,

GRAVES, DOUGHERTY, HEARON,
MOODY & GARWOOD
2300 Austin National Bank
Tower
P. O. Box 98
Austin, TX 78767
(512) 478-6421

By .....
JOHN T. ANDERSON
State Bar I.D. No. 01195600

ROGER NEIL MOSS, ESQ.
113 E. Lufkin Avenue
Lufkin, Texas 75901
(713) 632-1224

Attorneys for Intervenor
The Lufkin News

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been mailed, certified mail, return receipt requested, to Walter L. Borgfeld, Jr., Esq., Zeleskey, Cornelius, Rogers, Hallmark & Hicks, P. O. Drawer 1728, Lufkin, TX 75901; William D. Perkins, Esq., Fenley & Perkins, P. O. Box 450, Lufkin, TX 75901; Parker McVicker, Esq., McVicker & Evans, P. O. Box 1747, Lufkin, TX 75901; Richard Grainger, Esq., Grainger & Patterson, P. O. Box 491, Tyler, TX 75710; and Jim McBride, Esq., Biggs & McBride, 3118 Richmond, Suite 115, Houston, Texas 77098, this 14th day of August, 1981.

.....

JOHN T. ANDERSON

APPENDIX 5

No. 18,558-81-5

W. B. SHELTON, et al vs. D. H. MCVICKER, *et al*	IN THE DISTRICT COURT OF ANGELINA COUNTY, TEXAS 217TH JUDICIAL DISTRICT

ORDER

On the 3rd day of September, 1981, came on to be heard the Intervenors' petition in intervention, motion to require open hearings and motion to open transcript, and the Court after having considered the motion, the evidence, the arguments of counsel and pleadings on file in this cause is of the opinion and hereby finds that the petition and all relief requested therein should be denied.

IT IS THEREFORE, ACCORDINGLY, ORDERED, ADJUDGED AND DECREED that all relief requested in Intervenors' petition of intervention be and it hereby is denied. It is further ORDERED THAT ALL COST IN THIS BEHALF EXPENDED BE CHARGED TO INTERVENOR FOR WHICH LET EXECUTION ISSUE.

.....

JUDGE

APPENDIX 6

B. The Right to Open Judicial Proceedings.

1. The First and Fourteenth Amendments to the Constitution of the United States.

The Constitution, the statutes, and the common law of the State of Texas mandate open court proceedings; therefore, this Court need not base its decision on federal constitutional grounds. The federal constitution, however, guarantees to the public and the press the right of access to judicial proceedings and consideration of the rights guaranteed by the First Amendment will facilitate discussion of the issue before the Court. The United States Supreme Court has recently rendered two decisions that consider in detail the rights of the public and the press to attend judicial proceedings. In the first, *Gannett Co.* v. *DePasquale,* 443 U.S. 368 (1979) the Supreme Court held that a pre-trial suppression hearing in a criminal case could be closed to the public when closure was necessary to protect the accused's Sixth Amendment right to a fair trial. Because the case was decided by a divided court, the basis of the decision is important to the instant case for several reasons. First, Mr. Justice Stewart, who wrote the opinion of Court (joined by four other Justices, three of whom wrote separate opinions), found *only* that the defendant's Sixth Amendment right to a public trial did not create a right of access for the press and public. He expressly *declined* to base his decision on First Amendment grounds. Rather, he wrote that *if* the First Amendment conferred a right of access, that right had been overcome by the trial court's specific findings, supported by the evidence, that a public suppression hearing would jeopardize the accused's Sixth Amendment right to fair trial. 443 U.S. at 391-392. Second, the remaining four

Justices, in dissent, recognized the importance of the First Amendment but also declined to reach that question, arguing that the Sixth Amendment conferred a public right of access, which the circumstances of the case did not overcome. 443 U.S. at 406. Finally, and of greatest importance to the instant case, Justice Powell, whose concurrence was necessary to form a majority affirming the trial judge's order of closure, wrote an opinion in which he stated that the First Amendment guaranteed the public and the press a right of access to trial and pre-trial proceedings, which could only be overcome by a factual showing that a public hearing would endanger constitutional or other fundamentally important rights. 443 U.S. at 397. He voted to affirm the trial court, however, only because he found that the evidence below met his test for closure.

The divided *Gannett* decision thus set the stage for *Richmond Newspapers, Inc.* v. *Virginia,* .... U.S. ...., 100 S.Ct. 2814 (1980), decided exactly one year later. *Richmond Newspapers* reversed the order of a Virginia trial court that had excluded the press and the public from a murder trial. At the beginning of the defendants *fourth* trial (one earlier conviction having been reversed and two subsequent retrials having resulted in mistrials) the trial judge granted the defendant's unopposed motion to close the trial, apparently to avoid the possibility of yet another mistrial. This fourth trial resulted in an acquittal. The press, however, appealed from the trial court's order of closure. In reversing the trial court's order the Justices again wrote several opinions. It is clear from each of them, however, that eight Justices, all save Rehnquist, are of the opinion that the First and Fourteenth Amendments guarantee to the press and the public the right of access to trials.

While both *Richmond Newspapers* and *Gannett* specifically involved criminal trials, it is clear that the opinions apply to civil trials as well. As the Chief Justice pointed out in his opinion in *Richmond Newspapers* (joined by Justices White and Stevens), the historical analysis on which his decision rested applies with equal force to civil litigation. .... U.S. at ...., 100 S.Ct. at 2829, n. 17. That opinion reviewed the history of trials at English common law. Concluding that review, he "found nothing to suggest that the presumptive openness of the trial, which English courts were later to call 'one of the essential qualities of a court of justice,' [citation omitted], was not also an attribute of the judicial systems of colonial America." .... U.S. at ...., 100 S.Ct. at 2882. Supporting that view, Chief Justice Burger found, for example, that the early constitution of Pennsylvania, as well as those of other colonies, provided, in language identical to the Texas Constitution, "'[t]hat all courts shall be open ....".... U.S. at ...., 100 S.Ct. at 2823. The reasoning the Chief Justice relied upon to find a First Amendment right of access to trials also applies to civil litigation. "[T]he First Amendment guarantees of freedom of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted." .... U.S. at ...., 100 S.Ct. at 2827. Similarly, the First Amendment right of assembly guarantees the right to assemble in public places not only to speak but "to listen, observe, and learn," and "a trial courtroom ... is a public place where the people generally — and representatives of the media — have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place." .... U.S. at ...., 100 S.Ct. at 2828. (footnote omitted).

Justice Stewart, who had written the Court's opinion in *Gannett,* expressly recognized *Richmond Newspapers'* applicability to civil trials. . . . U.S. at . . . , 100 S.Ct. at 2840. Justices Brennan and Marshall concurred in this view. *See* 100 S.Ct. at 2338 (Brennan, J., concurring). Finally, the Court had previously, and expressly, held that, "What transpires in the courtroom is public property," without regard to whether or not the proceeding itself is civil or criminal. *Craig* v. *Harney,* 331 U.S. 367, 374, 378 (1947) The First Amendment thus guarantees both the public and the press access to civil as well as criminal trials.

Of equal importance to the instant case, *Richmond Newspapers,* read in light of *Gannett,* stands for the proposition that the First and Fourteenth Amendments guarantee access to pre-trial proceedings as well as to the trial itself. In this regard it is important to note that five of the Justices participating in the *Gannett* decision (Justices Powell, Blackmun, Brennan, White, and Marshall) agreed that the Constitution guaranteed a right of access to the pre-trial proceeding there in question. As previously noted, Justice Powell voted for affirmance of the trial court's order closing the hearing *only* because he determined that under the facts of that case, the defendant's Sixth Amendment right to a fair trial outweighed the First Amendment requirement of open proceedings. In the present case, no countervailing constitutional right is at issue. Indeed, Respondents offered no countervailing justification at all.

2. Section 13 of Article I of the Texas Constitution.

Section 13 of article I of the Texas Constitution expressly provides:

APPENDIX 7

CLERK'S OFFICE - SUPREME COURT

Austin, Texas

Sept. 24, 1981

Dear Sir:

In the case of COX ENTERPRISES, INC. v. VASCOCU, No. C-719 motion for leave to file petition for writ of mandamus was this day overruled. Motion to stay proceedings was also overruled.

Very truly yours,

GARSON R. JACKSON, Clerk

Opposition

Office - Supreme Court, U.S.
FILED
FEB 16 1982
ALEXANDER L. STEVAS,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO. 81-1154

COX ENTERPRISES, INC., d/b/a
THE LUFKIN NEWS AND JOE MURRAY,
Petitioners,

V.

MARCUS F. VASCOCU, JUDGE Presiding in the
District Court of Angelina County, Texas
217th Judicial District; B. H. McVICKER;
LARRY RISINGER; R. M. SHUMAKER; ROBERT
DOLLAK; JUANITA SPENCER and TEXAS
NATIONAL BANK OF LUFKIN,
Respondents

BRIEF IN OPPOSITION

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

PAUL R. GAVIA
Chief, State and County Affairs

LONNY F. ZWIENER
Assistant Attorney General

P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

Attorneys for Respondents

QUESTION PRESENTED

Whether the issues presented by the Petition are moot and require the dismissal or denial of the Petition for Certiorari.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

NO. 81-1154

COX ENTERPRISES, INC., d/b/a
THE LUFKIN NEWS AND JOE MURRAY,
Petitioners,

V.

MARCUS F. VASCOCU, JUDGE Presiding in the
District Court of Angelina County, Texas
217th Judicial District; B. H. McVICKER;
LARRY RISINGER; R. M. SHUMAKER; ROBERT
DOLLAK; JUANITA SPENCER and TEXAS
NATIONAL BANK OF LUFKIN,
Respondents

BRIEF IN OPPOSITION

The Respondent, Marcus F. Vascocu, Judge Presiding in District Court of Angelina County, Texas, respectfully requests that this Court dismiss or deny the petition for writ of certiorari seeking review of a decision of the Supreme Court of Texas.

OPINION BELOW

The opinion, in the form of an order, is not reported. It appears as Appendix 7 to the Petition for Writ of Certiorari.

JURISDICTION

The order or judgment of the Supreme Court of Texas was entered on September 24, 1981. Respondent Marcus F. Vascocu, Judge Presiding in the 217th Judicial District Court of Angelina County, Texas, was served with a copy of the Petition on January 4, 1982, but was not officially notified of the filing until January 26, 1982, such notice of filing indicating the Petition was filed on December 18, 1981. Accordingly, the filing of the Petition would appear to be timely.

However, Respondent Vascocu challenges jurisdiction on the ground of mootness of this cause and urges denial of certiorari for this reason. The mootness issue is addressed below.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner asserts that the First and Fourteenth Amendments to the Constitution of the United States are involved.

Respondent would say that Section 2 of Article III of the Constitution is controlling: "The judicial power shall extend to all cases. . . . arising under this Constitution . . ."

STATEMENT OF THE CASE

A suit was filed in the state district court in Angelina County, Texas by shareholders of the Lufkin National Bank against the Bank and some of its directors alleging certain improper practices by the Bank and certain of its Directors.

A pre-trial hearing was closed to the public upon the unopposed motion of the Bank, and Judge Vascocu, a visiting judge, granted the Motion.

The Petitioners in the present case petitioned to intervene and moved the Court to disclose the proceedings at the closed hearing.

Upon the Motion to Intervene being denied, Petitioners asked and were denied permission to file a Writ of Mandamas with the Texas Supreme Court, the Mandamus asking that the proceedings in state district court be ordered to be open to the public.

Petitioner then went into the federal district court for the Eastern District of Texas asking that the state pretrial proceedings be open to the public. The complaint was dismissed for lack of jurisdiction.

This Petition for Writ of Certiorari followed.

REASONS WHY THE WRIT SHOULD BE DENIED

Introductory

This Court has never directly held that pretrial proceedings must be open to the press and the public. Nor has the Court held that the First Amendment requires public access to a civil case.

However, these unanswered questions need not be discussed in view of the obvious mootness of the issues presented by the Petition.

The Issues Presented By The Petition Are Moot

On January 6, 1982, subsequent to the filing of the Petition, counsel for Petitioners submitted a proposed

order to the state district court. A copy of the proposed order and counsel's transmittal letter are attached hereto as Appendix I.

On January 7, 1982, the state court entered the submitted order with one interlineation, such order being filed by the state district clerk on January 13, 1982. The interlineation merely added the words "and intervention is denied" after the third sentence.

The order as submitted and entered demonstrates that all "proceedings, including pretrial proceedings in . . . (the state) cause, shall be open to the public."

While the order further provides for the eventuality that some pretrial proceedings might later be closed based upon need, a hearing must be held to make this determination with counsel for Petitioners present.

Moreover under the order, the record of past pretrial proceedings, which were closed, will be made available to Petitioners and the public.

Accordingly, it would appear that there is no case or controversy in this cause which would support jurisdiction for review by writ of certiorari.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be dismissed or denied.

Respectfully submitted,

MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant
Attorney General

RICHARD E. GRAY, III
Executive Assistant
Attorney General

PAUL R. GAVIA
Chief, State and County Affairs

LONNY F. ZWIENER
Assistant Attorney General
Bar No. 22299000
P. O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 475-3131

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument has been served by depositing same in the United States Mail, certified, return receipt requested addressed to Mr. Roger James George, Jr., Graves, Dougherty, Hearon & Moody, 2300 Austin National Bank Tower, P. O. Box 98, Austin, Texas 78767, on this ____ day of February, 1982.

LONNY F. ZWIENER

GRAVES DOUGHERTY, HEARON & MOODY
2300 AUSTIN NATIONAL BANK TOWER
POST OFFICE BOX 98
AUSTIN, TEXAS 78767

January 6, 1982

The Honorable Marcus F. Vascocu
Judge of the 188th Judicial District
Gregg County Courthouse
Longview, TX 75601

RE: Cause No. 18558-81-5
W. B. Shelton, et al v.
B. H. McVicker, et al

Dear Judge Vascocu:

Enclosed is a proposed order in accordance with your ruling on Tuesday, January 5, 1982.

I am sending copies to all counsel of record and assume that if anyone has any objections, they will contact me.

Sincerely,

GRAVES, DOUGHERTY,
HEARON & MOODY

By /s/
John T. Anderson

JTA/crm
Enclosure

cc: Mr. Roger Neil Moss
Mr. William Drew Perkins
Mr. Walter L. Borgfeld, Jr.
Mr. Parker McVicker
Mr. Richard Grainger
Mr. Jim McBride
Mr. Lonny F. Zwiener
Honorable James R. Griggs

No. 18558-81-5

W. B. SHELTON, ET AL	§ IN THE DISTRICT COURT
	§
V.	§ OF ANGELINA COUNTY,
	§
B. H. McVICKER, ET AL	§ TEXAS
	§
	§ 217TH JUDICIAL DISTRICT

ORDER

On the 5th day of January, 1982, came on to be heard the Intervenors' Motion for Reconsideration and Alternative Motion for Severance. The Court has accordingly reconsidered the Intervenors' petition in intervention, motion to require open hearings, and motion to open transcript heretofore filed in this cause. The Court recognizes that the Intervenors have no justiciable interest in the outcome of this cause on the merits. This court is of the opinion, however, and hereby finds that the general public, and the Intervenors, have a right to attend judicial proceedings in this Court, and in connection with this cause, which right must be balanced against the constitutional and other fundamental rights of the parties to this cause, if and when those rights conflict. The Court is accordingly of the opinion that the Intervenors' motion to require open hearings and motion to open transcript should be granted.

It is therefore, accordingly, ORDERED ADJUDGED and DECREED that pretrial hearings in connection with this cause shall be conducted as follows:

1. Proceedings, including pretrial proceedings in this cause, shall be open to the public.

2. Upon request by any party during the course of any pretrial proceeding that some portion of the hearing

be closed, the Court will conduct an *in camera* hearing, closed to the public, to determine whether a need exists for closing specified portions of pretrial hearings to the public. Counsel for Intervenors may be present at the *in camera* hearing to determine whether good cause exists to close further hearings, but, as an officer of the court, shall be prohibited from disclosing what transpires at that hearing without leave of court.

3. If upon the conclusion of the *in camera* hearing, the Court finds from a preponderance of the evidence that closing a portion of the pretrial proceedings is necessary to protect constitutional or other fundamental rights of the party or parties, seeking to close the proceedings, then the portion of the hearing that would cause such prejudice shall be conducted in private and the public and press shall be excluded therefrom.

4. Upon payment of the stipulated fees to the official reporter, the reporter is authorized and directed to prepare a transcript of all proceedings that have been conducted in this cause to date. Such transcripts shall be forwarded to this Court for review. Upon such review this Court shall release to the public, and to the Intervenors, such portions of the transcript as will not prejudice the fundamental or constitutional rights of any party.

SIGNED on this the ____ day of January, 1982.

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Marcus F. Vascocu,
Judge Presiding